STATE OF MICHIGAN

COURT OF APPEALS

MARGARET JUDD, Personal Representative of the Estate of JAMES SCOTT YAGER, Deceased,

Plaintiff-Appellant,

v

BASIM TOWFIQ, M.D., GOPI NALLANI, M.D., UDAYA CHINTALAPUDI, M.D., BOARD OF HOSPITAL MANAGERS OF FLINT HURLEY MEDICAL CENTER, HURLEY HEALTH SERVICES, HURLEY MEDICAL GROUP, P.C., and HURLEY PHO OF MID-MICHIGAN,

Defendants-Appellees.

UNPUBLISHED
October 11, 2007

No. 259107
Genesee Circuit Court
LC No. 04-078595-NH

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

In this wrongful death medical malpractice action, plaintiff, the personal representative of the decedent's estate, appeals as of right from a circuit court order granting summary disposition to defendants pursuant to MCR 2.116(C)(7) (statute of limitations). We affirm.

Plaintiff first argues that the circuit court lacked jurisdiction to enter orders affecting her or the estate after the probate court closed the estate in August 2004. Whether a court possesses personal jurisdiction over a litigant constitutes a legal question that this Court considers de novo. *In re SZ*, 262 Mich App 560, 564; 686 NW2d 520 (2004). To the extent this issue involves legal questions of statutory construction, we also consider these questions de novo. *Id*.

Several provisions of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq*., undermine plaintiff's assertion that the circuit court could take no action against her or the estate once the probate court ordered it closed. In MCL 700.3608, the EPIC addresses the termination of a personal representative's appointment and provides, in relevant part, as follows: "Termination of appointment of a personal representative occurs as provided in sections 3609 to 3612. Termination ends the right and power pertaining to the office of personal representative as conferred by this act . . . ." The parties do not dispute that plaintiff voluntarily filed a closing statement in the probate court in July 2004, and MCL 700.3610(1) expressly states that "[a] personal representative's appointment terminates 1 year after the filing of a closing statement as provided in section 3954."

MCL 700.3954 governs the circumstances under which a personal representative unilaterally may file a statement declaring an estate closed and, regarding the representative's authority, provides in MCL 700.3954(2) that "[i]f a proceeding involving the personal representative is not pending in the court 1 year after the closing statement is filed, the personal representative's appointment terminates."

The plain language of §§ 3608, 3610(1), and 3954(2) unambiguously contemplates that when a personal representative voluntarily files a statement declaring an estate closed, the representative remains appointed as the estate's representative for at least one year, thus imbued with the authority or capacity to act on behalf of the estate and to accept the impact of actions taken against the estate. See *Omdahl v West Iron Co Bd of Ed*, 478 Mich 423, 427; 733 NW2d 380 (2007) (observing that when statutory language is unambiguous, a court must give the words their plain meaning and apply the statute as written).

We therefore conclude that the circuit court had jurisdiction over plaintiff, as the estate's representative, when the court granted defendants summary disposition because (1) plaintiff filed in the probate court in early July 2004 the statement closing the estate, at which time this case remained pending in the circuit court, and (2) the circuit court entered its order granting summary disposition of plaintiff's complaint (filed on behalf of the estate) less than one year thereafter, before plaintiff's appointment as personal representative had terminated.

Plaintiff next argues that the circuit court erred by finding the complaint time-barred. This Court reviews a summary disposition ruling de novo. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

> Under MCR 2.116(C)(7), summary disposition is proper when a claim is barred by the statute of limitations. In determining whether summary disposition was properly granted under MCR 2.116(C)(7), this Court "consider(s) all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." [*Waltz v Wyse*, 469 Mich 642, 647-648; 677 NW2d 813 (2004), quoting *Fane v Detroit Library Comm*, 465 Mich 68, 74; 631 NW2d 678 (2001).]

"Whether a period of limitations applies to preclude a party's pursuit of an action constitutes a question of law that we [also] review de novo." *Detroit v 19675 Hasse*, 258 Mich App 438, 444; 671 NW2d 150 (2003).

The period of limitation governing a wrongful death action depends on the period of limitation applicable to the underlying theory of liability. *Lipman v William Beaumont Hosp*, 256 Mich App 483, 489-490; 664 NW2d 245 (2003). A medical malpractice plaintiff has two years from the date the cause of action accrued in which to file suit. MCL 600.5805(6).[1] A medical malpractice claim generally "accrues at the time of the act or omission that is the basis

[1] When the decedent's cause of action accrued, subsection (6) was codified as subsection (5). The analysis in this opinion references the current subsection.

for the claim of medical malpractice . . . ." MCL 600.5838a(1).[2] Because the alleged negligence of defendants occurred between August 5, 2001, the date of the decedent's first emergency room visit, and August 9, 2001, the date of his death, his malpractice claims accrued on these dates. We will assume for analysis purposes that the malpractice accrual date constitutes the date of the decedent's death; therefore, the period of limitation in MCL 600.5805(6) extended through August 9, 2003, at the latest.

The parties agree that plaintiff gave defendants notice of her intent to sue, as required by MCL 600.2912b, on May 12, 2003, before the two-year medical malpractice period of limitation expired. Pursuant to § 2912b and MCL 600.5856(c),[3] this notice tolled the malpractice period of limitation for 182 days. The 182-day tolling period extended through November 10, 2003, and the remaining portion of the medical malpractice period of limitation thereafter ran through February 7, 2004. Plaintiff's filing of the complaint on March 18, 2004, occurred after the medical malpractice period of limitation had expired.

In wrongful death actions, however, the Legislature has afforded plaintiff personal representatives additional time in which to pursue legal action on behalf of a decedent's estate. The wrongful death saving period, MCL 600.5852, provides as follows:

> If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, *an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued* although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run. [Emphasis added.][4]

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[2] Although MCL 600.5838a(2) gives a medical malpractice plaintiff until "6 months after the plaintiff discovers or should have discovered the existence of the claim" to file suit, the discovery rule is not at issue in this case.

[3] According to MCL 600.5856:

> The *statutes of limitations or repose* are tolled
>
> * * *
>
> (c) At the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose . . . ." [Emphasis added.]

At the time plaintiff gave notice, subsection (c) was subsection (d), but for consistency, we refer to current subsection (c).

[4] This Court has rejected plaintiff's suggestion that the three-year period mentioned in the second sentence of MCL 600.5852 constitutes a saving period or period of limitation independent of the
(continued…)

Because plaintiff received letters of authority on October 5, 2001, the wrongful death saving period extended through October 5, 2003.

The parties dispute whether, at the time plaintiff gave notice of her intent to sue, the giving of notice also extended the wrongful death saving period. In *Waltz, supra* at 648-651, 655, the Michigan Supreme Court held that under the clear and unambiguous language of MCL 600.5856, the filing of a notice of intent to sue during the two-year malpractice period of limitation in MCL 600.5805(6) operates to toll this period, but that the giving of notice does not toll the period in MCL 600.5852, which constitutes a wrongful death *saving period*, an *exception* to the limitation period. Controlling decisions of this Court have since determined that (1) the Supreme Court's holding in *Waltz* "applies retroactively in all cases,"[5] *Mullins v St Joseph Mercy Hosp*, 271 Mich App 503, 509; 722 NW2d 666 (2006), lv gtd 477 Mich 1066 (2007), and (2) equitable or "judicial tolling should not operate to relieve wrongful death plaintiffs from complying with *Waltz*'s time restraints," *Ward v Siano*, 272 Mich App 715, 720; 730 NW2d 1 (2006), lv in abeyance ___ Mich ___; 729 NW2d 213 (2007).

In this case, the appointment of plaintiff as personal representative on October 5, 2001, gave her until October 5, 2003, to commence this action within the wrongful death saving period. MCL 600.5852. Plaintiff gave notice of her intent to sue on May 12, 2003, but her provision of this notice did not toll the wrongful death saving period pursuant to MCL 600.5856(c). *Waltz, supra* at 648-651, 655. Consequently, plaintiff's filing of this action on March 18, 2004, occurred more than five months after the wrongful death saving period expired.

Regarding plaintiff's argument that the circuit court should have ordered dismissal of the action without prejudice to permit the appointment of a successor personal representative, the Michigan Supreme Court in *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 33; 658 NW2d 139 (2003), determined that MCL 600.5852 "clearly allows an action to be brought within two years after letters of authority are issued to the personal representative." Because § 5852 "does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative," the Court held that the successor personal representative could timely file suit within two years after receiving his letters of authority, and "'within 3 years after the period of limitations ha(d) run.'" *Eggleston*, *supra* at 33, quoting § 5852.

(…continued)

two-year period referenced in the first sentence of § 5852. As noted in *Farley v Advanced Cardiovascular Health Specialists, PC*, 266 Mich App 566, 575; 703 NW2d 115 (2005):

> [T]he three-year ceiling in the wrongful death saving provision is not an independent period in which to file suit; it is only a limitation on the two-year saving provision itself. Therefore, the fact that the three-year ceiling was not yet reached when [the plaintiff] filed suit is irrelevant.

[5] As noted in *Farley, supra* at 576 n 27, the courts have rejected the notion that a retroactive application of *Waltz*, in a manner that renders an estate's commencement of suit as untimely, qualifies as an unconstitutional abbreviation of the period for filing suit.

However, this Court has distinguished *Eggleston* and declined to apply it in cases like this involving an original personal representative's untimely filing of a complaint. See *Glisson v Gerrity*, 274 Mich App 525, 538-539; 734 NW2d 614 (2007) (rejecting the successor personal representative's claim that, despite the original personal representative's filing of an untimely complaint, a "dismissal without prejudice is nevertheless appropriate because" *Eggleston*'s interpretation of MCL 600.5852 afforded him "an additional two years, measured from . . . the date of his appointment . . . to pursue a cause of action on behalf of the estate"); see also *McLean v McElhaney*, 269 Mich App 196, 201; 711 NW2d 775 (2005), lv in abeyance ___ Mich ___; 728 NW2d 867 (2007) (finding the personal corepresentatives' medical malpractice complaint untimely and rejecting their *Eggleston*-based assertion "that the trial court should have permitted a voluntary dismissal of [the] plaintiffs' claims without prejudice so that a new personal representative could have been appointed to file suit on behalf of [the] estate"), and *Boodt v Borgess Medical Center (Boodt I)*, 272 Mich App 621, 635; 728 NW2d 471 (2006) (following *McLean*).[6] The Court in *McLean* further opined that "dismissal without prejudice would have been inappropriate" because "[b]eing subject to a second suit that would otherwise be barred under the doctrine of res judicata would be legally prejudicial to [the] defendants." *Id*. at 202-203. The Court stated that the "defendants were entitled to summary disposition because plaintiffs failed to file their claim within the period established by the Legislature. Thus, defendants were entitled to a judgment on the merits that would bar relitigation under the doctrine of res judicata." *Id*. at 202.[7]

Given the pertinent case law, we reject plaintiff's argument that the circuit court should have dismissed the case without prejudice.

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[6] The *Boodt I* majority indicated that it was following *McLean* only because it was required to under MCR 7.215(J)(1). See *Boodt I*, *supra* at 635-637. However, the Court of Appeals chose not to convene a special panel to resolve the apparent conflict, thus leaving the *McLean* precedent intact. See *Boodt v Borgess Medical Center (Boodt II)*, 272 Mich App 801; 727 NW2d 402 (2006). We note that in *Verbrugghe v Select Specialty Hosp*, 270 Mich App 383, 389; 715 NW2d 72 (2006), lv in abeyance ___ Mich ___; 722 NW2d 885 (2006), the Court purported to distinguish *McLean* and declined to follow it. However, in *Boodt I*, the panel clarified the issue and found that *McLean* and *Verbrugghe* "reached opposing and irreconcilable results" and that this Court is bound to follow *McLean* because it was the first opinion issued on the pertinent subject. See *Boodt I*, *supra* at 634-635 (opinion of the majority), 659-661 (opinion of Whitbeck, C.J.). We agree with this finding by the *Boodt I* panel.

[7] The Michigan Supreme Court has also addressed the concept of res judicata in the context of wrongful death medical malpractice actions filed by initial and successor personal representatives. See *Washington v Sinai Hosp of Greater Detroit*, 478 Mich 412; 733 NW2d 755 (2007). In *Washington*, the original personal representative filed an untimely complaint that the circuit court dismissed pursuant to MCR 2.116(C)(7), and the plaintiff, a later-appointed successor personal representative, also filed a complaint on the estate's behalf. *Id*. at 415. The Michigan Supreme Court held that res judicata barred the successor's action. *Id*. at 417-422.

Affirmed.

/s/ Bill Schuette
/s/ Joel P. Hoekstra
/s/ Patrick M. Meter